77-926

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,
Petitioner,
vs.
THE UNIVERSITY OF CHICAGO, et al.,
Respondents.

GERALDINE G. CANNON,
Petitioner,
vs.
NORTHWESTERN UNIVERSITY, et al.,
Respondents.

BRIEF AMICI CURIAE OF

Federation of Organizations for Professional Women, League of Women Voters of the United States, National Education Law Center, Center for Law and Education, Inc., National Conference of Puerto Rican Women, National Organization for Women Legal Defense and Education Fund, National Women's Political Caucus, Organization of Pan Asian American Women, Rural American Women, Sociologists for Women in Society, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, American Civil Liberties Union, and Women's Legal Defense Fund

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Federation of Organizations for Professional Women, League of Women Voters of the United States, Center for Law and Education, Inc., National Conference of Puerto Rican Women, National Organization for Women Legal Defense and Edu-

cation Fund, National Women's Political Caucus, Organization of Pan Asian American Women, Rural American Women, Sociologists for Women in Society, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, American Civil Liberties Union, and Women's Legal Defense Fund, with the consent of the parties as provided in Rule 42 of the Rules of this Court.

These organizations share a concern that individuals be free to participate in all facets of American life without discrimination on the basis of gender. Central to the effort to secure equal rights for women is the establishment of an educational system which is itself free from gender-based bias. Title IX is one of the most important tools available to combat sex discrimination in educational institutions. To preclude private rights of actions under Title IX would be to eliminate a critical means for securing compliance with the law.

SUMMARY OF ARGUMENT

I

1. The issue in this case is whether individuals may seek judicial enforcement of the right created by Title IX of the Education Amendments of 1972 to be free from gender-based discrimination by educational institutions receiving federal funds. Our approach to this issue turns principally upon the fact that § 901(a) of Title IX expressly extends its guarantees to individuals. The language used in that section—"No person in the United States shall, on the

basis of sex, . . . be subjected to discrimination under any educational program or activity receiving federal financial assistance"—directly focuses upon the rights accorded to individuals. In doing so, the statute is quite similar to the Fourteenth Amendment and to various civil rights acts extending equal protection rights to each person. The limitation contained in § 901 to federally-assisted programs is simply descriptive, in this context, of the covered institutions. It was probably included to preclude constitutional problems, and was of little practical significance by the time Title IX was passed; federal financial assistance to educational institutions was so pervasive by then that almost all schools in the country were covered.

2. The legislative history of Title IX vividly supports our contention that the central purpose of that Title was to create new personal federal rights. Title IX was passed during a period when Congress was particularly aware of, and concerned about, the inadequacy of federal constitutional and statutory protections against gender-based discrimination. Further, Congress was presented, during the hearings which preceded the passage of Title IX, with evidence of massive and pervasive discrimination against women by educational institutions. The debate on Title IX focused principally upon that evidence and upon the consequent necessity to create " a strong and comprehensive measure . . . to provide women with solid legal protection" from gender-based discrimination in education. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh).

3. From the conclusion that Congress consciously and explicitly created in Title IX a new federal right personal

to each individual, the further conclusion that such right is enforceable in court would ordinarily follow. For, just as the availability of relief in federal courts from invasion of constitutional rights is presumed, so this Court has permitted private judicial enforcement of federal statutory rights to equal protection when the statute declaring those rights does not explicitly provide for such enforcement. See, e.g., *Jones v. Afred H. Mayer Co.*, 392 U.S. 409, 415 n.15 (1968); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The question, then, is whether the fact that Congress went further in Title IX than a simple declaration of rights and included, in § 902, provisions for administrative action in furtherance of those rights, requires a different result than if Congress had failed so to provide.

II

1. Comparison of the scope of the right created in Title IX with the character of the administrative enforcement established by § 902 compels the conclusion that administrative action was intended as complementary to, but not coextensive with, the guarantees of § 901.

Section 902 provides that federal departments and agencies "may" effect compliance "by termination or refusal to grant or to continue assistance" or "by any other means authorized by law;" termination must be preceded by opportunity for voluntary compliance, a full hearing, and a report to the appropriate committees of Congress. For several reasons, this enforcement mechanism is incapable of, and was not intended as, full protection of the guarantees created in § 901.

Administrative enforcement under § 902 operates only prospectively, while § 901 applies in the present to any institution "receiving" federal funds. As a result, the threat of termination does not act as a deterrent to programs who do not expect their federal assistance to continue in the future. Further, even as to those programs which do rely upon continued federal assistance, fund termination does not assure that *individual* rights will be protected. For example, if Ms. Cannon were able to prove that she was indeed denied admission to medical school because of gender-based discrimination, and the termination sanction were invoked, neither she nor others similarly situated would ever receive the medical school education they were illegally denied while federal funds were being received.

Further, § 902 is not coextensive with § 901 for another reason: it lodges enforcement authority only in federal "agencies or departments", while § 901 is not so limited. Federal funds are sometimes dispensed through entities which are not federal "agencies or departments". When they are, there would, but for private suits, be no means of enforcement at all if § 902 were exclusive.

On the other hand, § 902 does serve a function which would not have been served if § 901 stood alone. The authority to terminate federal funds because of violation of § 901 would not follow inexorably from § 901 itself; it was therefore necessary specifically so to permit. Thus, §§ 901 and 902 serve complementary but not coextensive functions, and § 902 should not be read as a limitation upon the rights created in § 901.

2. While the availability of individual judicial relief to protect § 901 rights would follow, without more, from the considerations discussed above, there are specific indications in the legislative history of Title IX, and of Title VI of the Civil Rights Act of 1964 upon which Title IX was structurally based, that Congress did not understand or intend § 902 as the sole means of enforcing the personal rights created in Title IX. First and most important, in § 11 of Title VII of the Education Amendments of 1972, the same Act of which Title IX was part, Congress provided attorneys' fees for plaintiffs in certain private enforcement actions under Title VI of the Civil Rights Act of 1964. Since Title IX was consciously modelled upon Title VI, the fact that Congress in passing the attorneys' fees provision in 1972 acted directly upon the understanding that private enforcement actions were available under Title VI must be taken as conclusive evidence that it understood that such private actions would be available under the newly-enacted, parallel provisions of Title IX.

Second, Congress in Title IX failed to foreclose private lawsuits such as third-party beneficiary actions and suits under 42 U.S.C. § 1983, derived from Title IX but not based directly upon it. This suggests that judicial enforcement of Title IX's guarantees was not considered to be inconsistent with the administrative powers established by § 902.

Third, in enacting Title VI, Congress rejected an approach which would solely have provided the enforcement authority, substituting instead the two-part structure later

followed in Title IX. A dispute which arose about the coverage of Title VI for contracts of loan and guarantee, and the resolution of that dispute, demonstrates that Congress plainly understood that the declaration of rights contained in § 601 was not limited to the right to the enforcement mechanism created in § 602. Given the intentional parallelism between Title IX and Title VI, the same conclusion follows as to §§ 901 and 902. Section 902 must therefore be viewed as an additional means of enforcement to traditional judicial powers, rather than as a substitute therefor.

III

1. The Court of Appeals erroneously viewed three recent decisions of this Court—*National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); and *Cort v. Ash*, 422 U.S. 66 (1975)—as requiring denial of personal enforcement suits under Title IX. These three cases did not involve statutes which explicitly created personal rights. To the contrary, the statutes involved in those cases were, as this Court specifically noted, designed principally to protect public interests. Therefore, in those cases the presumption of the availability of private enforcement did not arise.

2. Further, the analysis, as opposed to the result, in *Cort, supra,* fully supports the outcome we seek in this case. The four factors identified in *Cort* as relevant to determining whether private lawsuits may be brought to enforce federal statutes all argue strongly in favor of a

private cause of action under Title IX. In deciding otherwise, the court below misunderstood the role of statutory construction principles in a case of this kind, and misunderstood as well the complementary interface between private enforcement actions and proceedings under § 902 of Title IX.

3. Finally, there are three decisions of this Court—*Rosado v. Wyman,* 397 U.S. 397 (1970); *Allen v. Board of Elections,* 393 U.S. 544 (1969); and *Calhoon v. Harvey,* 379 U.S. 134 (1964)—which, taken together, do control the disposition of this case. In *Allen* and *Calhoon,* the statutes did create personal rights. In *Allen,* the Court permitted private enforcement without inquiring into whether such enforcement was specifically intended by Congress, while in *Calhoon,* a private cause of action was denied only because Congress expressly so provided. And, in *Rosado,* the Court permitted private enforcement actions despite the existence of a fund termination mechanism quite similar to that contained in § 902, stressing that the resolution of disputes concerning guarantees attached to the expenditure of federal funds is "peculiarly part of the duty of this tribunal." 397 U.S., at 423.

Thus, these three cases, unlike the three quite different cases relied upon below, involve statutes quite similar to Title IX, and require that individuals be permitted to enforce in court the rights Congress guaranteed each person when it enacted Title IX.

ARGUMENT

I

Section 901 of the Act Directly Creates Personal Rights Which Federal Courts May Enforce.

The issue in this case is whether individuals may seek judicial enforcement of the protection against gender-based discrimination extended by Title IX of the Education Amendments of 1972. In our view, the answer to that question turns principally upon the fact that § 901 of Title IX, a section separate from the later provisions of the Title that concern administrative enforcement powers, expressly extends its guarantees to individuals, and does so in language similar to that used in the Fourteenth Amendment and in various civil rights acts long construed to create personal rights. The legislative history of Title IX makes clear that the decision to create new personal federal rights was quite conscious. The debate on Title IX focused primarily upon the lack of effective constitutional and statutory protection against gender-based discrimination, the evidence of massive and pervasive sex discrimination by educational institutions, and the consequent need to extend to each individual a right to be free from such discrimination by programs receiving federal funds. Since Congress consciously and explicitly created in Title IX a new federal right personal to each individual, the conclusion that such right should be presumed to be enforceable in federal court follows. For, this Court has traditionally permitted actions to enforce personal federal rights even

where the constitutional or statutory provision creating that right does not expressly so permit.

1. *The Personal Rights Language of § 901.* The first section, § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C., § 1681(a), declares in sweeping terms that:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."[1]

This language, appears on its face to be a broad declaration of personal rights. It directs that *"no person"* shall be subject to discrimination, thus focusing directly upon the rights of individuals. Since "the guarantees of the [statute] extend to persons . . . the 'rights created are, by its terms, guaranteed to the individual. The rights established are personal rights.'" *Regents of University of California v. Bakke,* ..... U.S. ....., 46 U.S.L.W. 4896, 4901 (1978) (Opinion of Powell, J.), quoting *Shelley v. Kraemer,* 334 U.S. 22 (1948); see also *Bakke, supra,* 46 U.S.L.W., at 4935, n.19 (Opinion of Stevens, J.).

Moreover, as this Court has recently noted, prohibitions against discrimination are necessarily peculiarly focused upon individuals. Such prohibitions "preclude treatment

[1]While the remaining subsections of § 901(a), some of which were added in 1974 (Pub. Law 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862) and 1976 (Pub. Law 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234), set out certain exceptions to this proclamation, the exceptions are not pertinent here. This case involves "admissions to . . . institutions of professional education," (§ 901(a)(1)), and therefore is squarely within the scope of the statute.

of individuals as simply components of a . . . class." *City of Los Angeles, Dept. of Water v. Manhart,* ..... U.S. ....., 46 U.S.L.W. 4349 (1978). The fact that statutes and constitutional provisions dealing with discrimination typically are worded with a focus on "persons" or "individuals" is therefore not fortuitous. Their precise purpose is protection of the right of individuals to be treated as individuals. (See, e.g., § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

Thus, it is not surprising that the wording of § 901(a) bears a striking resemblance to that used in constitutional and statutory provisions which undeniably confer personal rights to be free from discrimination upon individuals. The Fourteenth Amendment, for example, states: "No state shall deny to *any person* . . . the equal protection of the laws." (Emphasis supplied).

The fundamental protections of many of the Civil Rights Acts are similarly worded. For example, 42 U.S.C. § 1981, recently construed to confer enforceable personal rights to be free from private employment and educational discrimination based on race[2] reads: *"All persons* . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." (Emphasis supplied). See also 42 U.S.C. § 1982.

The direct ancestor of the language and structure of Title IX was Title VI of the Civil Rights Act of 1964, as those who devised Title IX stressed. (117 Cong. Rec.

[2]*Johnson v. Railway Express Agency,* 421 U.S. 454 (1975); *Tillman v. Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); *Runyon v. McCrary,* 427 U.S. 160 (1976).

13555 (1971) (remarks of Sen. Bayh); 118 Cong. Rec. 5807 (remarks of Sen. Bayh); 117 Cong. Rec. 39252 (remarks of Rep. Mink). Section 601 of Title VI provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

While a majority of this Court declined, in *Bakke, supra,* to determine whether or not a private action to enforce § 601 of Title VI is available, five members of the Court laid great stress upon the fact that the language of Title VI created "personal rights." 46 U.S.L.W., at 4901 (Opinion of Powell, J.); *id.,* at 4936 nn.26 & 28 (Opinion of Stevens, J.).

It is true, of course, that § 901 of Title IX, like § 601 of Title VI, limits the programs covered to those "receiving Federal financial assistance." That limitation, however, is simply descriptive of the institutions against which the right may be asserted.[3]

The limitation to educational programs "receiving Federal financial assistance" was of relatively little practical significance by the time Title IX was passed. For, before 1972, and in the Education Amendments of 1972

[3]The reason for limiting Title IX to educational programs receiving federal financial assistance is nowhere stated in the legislative history of the statute. One may, however, infer the reason: to avoid any conceivably meritorious constitutional attack upon the legislation. For, in venturing into regulation of the internal affairs of public and private educational institutions, Congress was plainly treading into areas traditionally reserved to the states. Constitutional attacks based on the limits of federal power could fairly have been anticipated.

It is probable, of course, that federal prohibition of gender-based discrimination in public institutions would be valid if enacted pursuant to § 5 of the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). A similar prohibition upon private educational institutions might well also be constitutional, as an exercise of federal power to regulate interstate commerce. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964). But, if either of these propositions was considered at all dubious (and both were plainly in question at the time Title VI, the structural model for Title IX, was enacted),

> "There is of course no question that the Federal Government . . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n,* 330 U.S. 127, 143 (1947)." *King v. Smith,* 392 U.S. 309, 333 (1968).

Cf. Steward Machine Co. v. Davis, 301 U.S. 548, 597-598 (1937); *Helvering v. Davis,* 301 U.S. 619, 645 (1937); *Rosado v. Wyman,* 397 U.S. 397, 420-423 (1970).

[4]See, *e.g.,* Title I of the Education Act of 1964, 20 U.S.C. 241a et seq. (financial assistance to local school districts for the education of children of low-income families); Title IV of the Education Amendments of 1972, 20 U.S.C. § 241aa et seq. (financial assistance to local educational agencies for education of Indian children); Titles II, III & IV of the Education Act of 1965, 20 U.S.C. §§ 331 et seq., 821 et seq., 841 et seq. (financial assistance for *inter alia,* instructional materials, libraries, construction and demonstration projects in elementary and secondary school); National Defense Education Act of 1958 *as amended,* 20 U.S.C. § 401 et seq. (financial assistance to institutions of higher education, and to public ele-

of which Title IX was a part, Congress provided for broad programs of federal financial assistance to institutions of the kinds covered by Title IX.[4] The result was that Title IX could be expected to cover, once passed, almost every elementary and secondary school and virtually all colleges

and universities in the country.[5] Thus, the limitation to programs "receiving federal financial assistance" does not detract from the conclusion that the language of § 901 created broad personal rights.

2. *Guarantee of Personal Rights as the Principal Purpose of Title IX.* The legislative history of Title IX vividly confirms the impression given by the language of § 901(a)—that Congress intended to create, in Title IX, a new and broad right, the right to be free from gender-based discrimination by educational institutions. For that history focuses almost entirely upon the scope of the sex-discrimination problem in education and the necessity to provide new substantive guarantees to deal with that problem, with little mention made of the con-

mentary and secondary schools, for various purposes relating to strengthening academic development of students); Bilingual Education Act of 1968, 20 U.S.C. § 880b et seq. (financial assistance to local educational agencies and institutions of higher education for educational needs of children of limited English-speaking ability); Titles V & VII of the Education Amendments of 1972, 20 U.S.C. §§ 887d & 900 et seq. (financial assistance to public and private educational institutions for consumer education and ethnic heritage studies); Higher Education Act of 1965, *as amended, inter alia,* by the Education Amendments of 1972, 20 U.S.C. § 1001 et seq. (grants to institutions of higher education for continuing education, library services, developing institutions and community colleges, student financial assistance and loans, teacher education, equipment and remodeling, construction, and cooperative education); International Education Act of 1966, 20 U.S.C. § 1171 (grants to institutions of higher education for graduate centers in international studies); Emergency School Aid Act of 1972, 20 U.S.C. § 1601 et seq. (grants to local educational agencies for programs concerning racial integration and minority education); and, Vocational Education Act of 1963 and Vocational Education Amendments of 1968, former 20 U.S.C. §§ 1241 et seq. and 1301 et seq. (grants for vocational education).

[5]United States Commission on Civil Rights, *A Guide to Federal Laws and Regulations Prohibiting Sex Discrimination,* (Clearinghouse Publication No. 46, July, 1976 (revised)), at 76.

nection between the guarantee extended and the process of distributing federal funds.

In assessing the legislative history, it is helpful to recall at the outset the setting in which Title IX was devised.

First, the spate of recent gender-based discrimination decisions under the Fourteenth Amendment (see, e.g., *Craig v. Boren,* 429 U.S. 190 (1977); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973)) did not exist. There was, at the time, only the bare glimmer of an indication from this Court that gender discrimination by public educational institutions could be subjected to any meaningful constitutional review. *Reed v. Reed,* 404 U.S. 71 (1971).[6] The Equal Rights Amendment was pending in Congress during the same period as the Education Amendments of 1972,[7] so that the inadequacy of existing constitutional protections against gender-based discrimination was the subject of contemporary Congressional attention.

Moreover, Congress was about to provide, in the other titles of the Bill of which Title IX was a part, for massive federal assistance to institutions of higher education, and

[6]As Senator Bayh noted in first introducing the amendment which became Title IX:

> "While racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State's maintenance of a branch of its public university system on a sexually segregated basis." 117 Cong. Rec. 30155 (1971).

[7]The final vote in the House on the Equal Rights Amendment was 354 to 24, on October 12, 1971. 117 Cong. Rec. 35815 (1971). The final vote in the Senate was 84 to 8, on March 22, 1972. 117 Cong. Rec. 9598.

to students in those institutions, on a scale unheard of previously. Yet, there was no general federal protection against gender-based discrimination by these private institutions, many of which dominate entry into careers and professions.

Second, there was massive evidence before Congress,[8] demonstrating that gender-based discrimination was both pervasive and destructive:

> " . . . one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women [which] . . . reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales. Indeed, the recent 'Report on Higher Education' funded by the Ford Foundation concluded, 'Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.' " 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh).

In particular, it was reported to Congress that "the percentage of the female population enrolled in college [is] markedly lower than the percentage of the male

[8]Much of this evidence was derived from extensive hearings held in the summer of 1970 by the House Special Committee on Education. These hearings produced "over 1,200 pages of testimony documenting the massive, persistent patterns of discrimination against women in the academic world . . . [,] a situation which approaches national scandal . . ." 118 Cong.Rec. § 5804 (remarks of Sen. Bayh).

population." 118 Cong. Rec. 5805 (remarks of Sen Bayh).[9] And, even if admitted to college, women were less likely to receive adequate financial aid (118 Cong. Rec. 5805 (remarks of Sen. Bayh)), and were denied admission, although qualified, to prestigious honorary societies. 118 Cong. Rec. 5811 (paper of Dr. Bernice Sandler, n.9, *supra*). Moreover, the situation with regard to graduate and professional schools was even more dismal: In many areas of graduate and professional studies, including such prestigious fields as law and medicine, women in 1972 constituted a small percentage of the total enrollment. 118 Cong. Rec. 5805, 5806 (remarks of Sen. Bayh); see also, *id.*, at 5809.[10]

Even those women who did attain and complete graduate training remained victims of discrimination by

[9]It was recognized that "some of these differences [in enrollment] result from sex-role expectations in our society. However, there are indications that discrimination does exist at many schools." 118 Cong.Rec. 5805 (1972) (remarks of Sen. Bayh). Evidence of discriminatory practices included one study showing that identical applications would be rejected if the applicant were identified as female and accepted if the applicant were identified as male. 118 Cong.Rec. 5811 (paper of Dr. Bernice Sandler presented to Association of American Colleges). Indeed, certain colleges explicitly admitted only "especially well-qualified" women, while insisting upon no exceptional ability for men. 117 Cong.Rec. 39258 (1971) (remarks of Rep. Abzug); H. Rep. No. 92-554, 92nd Cong., 1st Sess. (1972), at 51.

[10]Particularly troublesome was the fact that far from improving, this situation seemed to be worsening. Thus,

> "Dr. Francis S. Norris testified during the same hearings that although the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929-30 and 1965-66—while male applications increased by only 29 percent—the percentage of women applicants who were accepted actually declined during the same time period." 118 Cong.Rec. 5806 (remarks of Rep. Bayh).

universities: the number of tenured female professors at universities was miniscule, even when those same universities produced much higher percentages of female Ph.D.'s. 118 Cong. Rec. 5805 (remarks of Sen. Bayh); see also, *id.*, at 5810. And, "the rule is that once hired women do not receive equal pay for equal work." *Id.*

This same phenomena was noted in public schools:

> "[M]ore than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals . . . [and] only two women can be found among 13,000 school superintendents." 118 Cong. Rec. 5805 (remarks of Sen. Bayh).

Further, elementary and secondary schools were noted to practice gender-based discrimination as to students as well: many vocational training schools and classes were sex segregated (118 Cong. Rec. 5806 (remarks of Sen. Bayh)), with the result that "[more] lucrative fields . . . [are] 'reserved' for males [even though] it is only tradition which keeps women out of those fields." *Id.*

In response to the "vicious and reinforcing pattern of discrimination" (118 Cong. Rec. 5804 (remarks of Sen. Bayh)), and to the lack of "effective protection for [women] as they seek admission and employment in educational facilities," (117 Cong. Rec. 30155 (remarks of Sen. Bayh)), Congress determined in Title IX to "guarantee that women enjoy the educational opportunity

every American deserves." *Id.* The bill was therefore designed as:

> "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (remarks of Sen Bayh).

Frequent emphasis was given in the legislative debates to the need to give individuals the same protection from gender-based discrimination in education accorded, under the Constitution and the civil rights statutes, to victims of race discrimination:

> "[What] this title does is to ask that a woman be considered as a human being, that her qualifications be considered in the same fashion as those of a male. If she qualifies, she should not be discriminated against on the basis of sex, just as we do not now discriminate on the basis of race." 117 Cong. Rec. 39259 (remarks of Rep. Green). See also, e.g., 117 Cong. Rec. 39256 (remarks of Rep. Waggoner); 117 Cong. Rec. 30155 (remarks of Sen. Bayh); 118 Cong. Rec. 5807 (remarks of Sen. Bayh).

To accord that protection, it was plainly necessary to create a *new* personal right theretofore non-existent, which is precisely what Congress did in § 901(a).[11]

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[11] In this respect, Title IX differs from Title VI as construed by the majority of the Court in *Bakke*. See *Bakke, supra* (Opinion of Powell, J.); *id.* (Opinion of Brennan, White, Marshall, and Blackmun, JJs.). That is, Title IX, unlike Title VI, did not simply incorporate the constitutional standard for determining the legality of discrimination but created a new, more stringent standard for educational institutions. As interpreted by HEW, that standard is basically the same one established with respect to sex discrimination

For that reason, it is not at all surprising that Senator Bayh described as "the heart of [the Title] . . . the provision [§ 901(a)] banning sex discrimination in educational programs receiving federal funds." 118 Cong. Rec. 5803 (remarks of Sen. Bayh). Nor is it surprising that the various amendments circumscribing the protection accorded were added to § 901(a) of the bill, rather than to the later sections dealing with the enforcement authority of HEW. For, § 901(a) is the section describing the nature and limits of the personal right created, so that limitations placed elsewhere in the bill would be ineffective to assure that the prohibition upon discrimination extended only as far as intended.[12]

Congress' *primary* purpose, then, in devising Title IX was to provide:

> "the essential *guarantees* of equal opportunity in education for men and women . . . [,] to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5804 (remarks of Sen. Bayh) (emphasis supplied).

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under Title VII of the Civil Rights Act of 1964. Compare, e.g., 45 C.F.R. §§ 86.21 (b)(2), (c)(2) with *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *Manhart, supra;* see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[12]See discussion in Part II, *infra*, at pp. 33 - 38 of the amendment to Title VI of the Civil Rights Act of 1964 concerning contracts of guarantee.

The legislative history thus illustrates that Congress intended precisely what the language chosen for § 901(a) suggests—to create a new federal right, personal to each individual affected.

3. *Judicial Enforcement of Personal Rights.* From the conclusion that Congress consciously and explicitly created a federal right personal to individuals, the further conclusion that such right is enforceable in federal court ordinarily follows.[13] For, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). Consequently, "the . . . availability of federal equitable relief against threatened invasions of constitutional interests" has long been "presumed" (*Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 404 (1971) (Harlan, J., concurring)), so that, by 1946,

> "it [was] established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from

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[13]Of course, there must also be jurisdiction to entertain the suit. It would appear, however, that if a cause of action is available under Title IX, there would always be jurisdiction under 28 U.S.C. § 1343(4), for the suit would be one "under [an] Act of Congress providing for the protection of civil rights . . . ." *Allen v. State Board of Elections,* 393 U.S. 544, 554 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968). If this supposition proved incorrect, there would be jurisdiction in cases involving relief worth more than $10,000 under 28 U.S.C. § 1331; suits involving less than that amount might be relegated to state court, but the right enforced would still be a federal right. *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

doing what the Fourteenth Amendment forbids the state to do." *Bell v. Hood,* 327 U.S. 678, 684 (1946).

Similarly, personal federal statutory rights are presumptively enforceable in federal courts. Thus, this Court:

> "held in *Jones v. Alfred H. Mayer Co.*, that although [42 U.S.C.] § 1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an effective equitable remedy. 392 U.S. [409], 414, n.13." *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 238 (1969). (1969). See also cases cites a p. 11, n.2, *supra.*

The *Jones v. Alfred H. Mayer Co.* holding was an example of the principle that where,

> "[a]n Act as a whole indicates an intention to establish a statutory right . . . the litigant may enforce [that right] . . . by such legal or equitable actions or procedures as would normally be available to him." *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940).[14]

[14]The issue of whether damages, as opposed to equitable relief, may be awarded without explicit authorization has been regarded as presenting different and more difficult, although not insuperable, problems. *Bivens, supra,* 403 U.S., at 395-396; *id.,* at 400-406 (Harlan, Jr., concurring); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 415 n.14 (1968); compare *Deckert, supra, with J.I. Case Co. v. Borak,* 377 U.S. 426 (1964); *cf. Piper v. Chris Craft Industries, Inc.,* 430 U.S. 1, n.33 (1977).

Justice Harlan in *Bivens* analyzed the distinction between granting equitable relief and providing a cause of action for legal damages as one which "relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but to the criteria which should govern the exercise of our power." 403 U.S., at 406. He suggested that the appropriate criteria for whether to permit legal damages where a personal federal right is at stake is "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.,* at 407.

In sum, since Title IX expressly creates personal federal rights, since the primary purpose and intent of the statute was to create such rights, and since judicial relief is ordinarily available to enforce a clear personal federal right, such relief would be available if § 901 were the only section of Title IX. The question, then, is whether the fact that Congress went further than a simple declaration of rights and included provisions for administrative action in furtherance of those rights requires a different result than if it had failed so to provide.

II

The Availability of an Administrative Fund Termination Mechanism under § 902 of Title IX does not Detract From the Personal Rights Created by § 901, or Negate the Availability of Judicial Enforcement of those Rights.

The Court of Appeals, while conceding on rehearing that the result might well be otherwise had Congress provided *no* administrative enforcement mechanism (559 F.2d

While Ms. Cannon is seeking damages as well as equitable relief, there is no need to determine at this juncture the availability of a legal damages remedy under Title IX. If Ms. Cannon's cause of action is proven and the equitable relief sought is granted, petitioner may no longer "have suffered any uncompensated injury." *Jones, supra,* at 414, n.14. Under these circumstances, it would be inappropriate to decide the damages question. *Id.* Further, many forms of monetary relief are available as an exercise of the equitable jurisdiction of the federal courts. See, e.g., *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416-22 (1975) *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 291-93 (1960); *Porter v. Warner Holding Co.,* 328 U.S. 395, 397-403 (1946). Since, in many Title IX cases, the monetary relief sought, if any, may be restitutionary and therefore equitable in nature, the availability of monetary, as opposed to declaratory and injunctive, relief under Title IX is best left until a case arises in which the availability of a precise sort of monetary relief is at issue.

1063, 1082), viewed the enforcement provisions of § 902 of Title IX—specifically, the fund termination authority—as precluding any private remedy for breach of the guarantee contained in § 901. The Court of Appeals' decision in effect limits the personal right created by the broad language of § 901 to the right to the enforcement procedures established in § 902.

This proposition must be rejected. Comparison of the rights created in § 901 with the enforcement mechanism created by § 902 demonstrates that the enforcement authority conferred upon federal agencies and departments is complementary to, but not coextensive with, the right created by Title IX, and was not designed as a means of assuring *individuals* their rights under § 901. The legislative history of Title IX, and of Title VI of the Civil Rights Act upon which it was structurally modeled, confirms that Congress did not intend the enforcement authority as a limitation upon the right created, or upon the ordinary power of federal courts to enforce personal federal rights.

1. *Comparison of §§ 901 and 902.* Section 902 provides, first, that federal departments and agencies are "authorized and directed" to implement Title IX by issuing "rules, regulations, or orders of general applicability."[15]

[15]The fact that departments and agencies are directed to implement the general non-discrimination standard with particular regulations adapted to specific programs is not itself of any moment in

Second, departments and agencies "may" effect compliance with the requirements established "by termination or refusal to grant or to continue assistance" or "by any other means authorized by law."[16] Third, departments and agencies may not act to cut-off funds unless opportunity for voluntary compliance is provided. If no such compliance is forthcoming, a full hearing must be held prior to termination of funds. Finally, an intention to terminate funds must be reported to the appropriate committees of Congress before the termination may be effective.

The fund termination authority is incapable of protecting the broad rights created by § 901 for a very fundamental reason: It operates only prospectively, while § 901 applies in the present to any institution *"receiving"* federal financial assistance.

The prospect of fund termination in the future may, of course, serve as a deterrent to those programs which expect to rely on federal funds in the future. But, no such deterrent exists under § 902 with regard to the

determining the degree to which enforcement of the statute's guarantees has been exclusively committed to administrative process. See, e.g., *J. I. Case Co. v. Borak, supra; Piper v. Chris-Craft Industries, supra; Lewis v. Martin*, 397 U.S. 552 (1970).

[16]The Department of Health, Education and Welfare has construed the "other means authorized by law" to include "a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights *of the United States* under any law of the United States . . . or any assurance or other contractual undertaking and . . . any applicable proceedings under State or local law." 45 C.F.R. § 80.8(a) (emphasis supplied), as incorporated in 45 C.F.R. § 86.71. Thus, HEW has interpreted "other means authorized by law" to authorize lawsuits by the Attorney General enforcing public, but not private, rights.

funding of discrete, time-limited programs. Yet, the guarantees of § 901 apply whether or not the program involved expects to continue as a federally assisted program.

Moreover, even with regard to institutions such as the medical school respondents in this case which, presumably, expect to continue to rely upon federal funds, the ultimate cut-off sanction could not be expected to assure for individuals protection of the personal rights established in § 901. For example, Ms. Cannon, if she is allowed to proceed with her lawsuit and establishes on the merits that she was indeed denied admission because of gender-based discrimination, would be entitled, under ordinary equitable principles, to a court order requiring her admission to the medical schools for the normal course of study. See *Bakke, supra,* 46 U.S.L.W., at 4896. If she were required instead to rely upon the administrative mechanism exclusively, she might well never achieve the medical school education she was denied in violation of § 901. For, if HEW agreed that her rights had been violated and attempts to effect *voluntary* compliance failed, termination proceedings could be instituted. But, while termination of funds will assure against violation of § 901 in the future,[17] such termination will not remedy past violations

[17]For this reason, a suit for enforcement of rights under § 901 is not the functional equivalent of a private suit to compel termination of funds under § 902. That is, once a violation of the rights accorded by § 901 is proven, a court applying equitable principles could order an institution to remedy that violation by taking action in the future even if, at the time that action is taken, the program is no longer receiving federal funds. Cf. *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Hills v. Gautreaux,* 425 U.S. 284 (1976). Thus, a program could not escape the effect of a judicial remedial order under § 901 by voluntarily refusing further federal funds.

of § 901, or provide for Ms. Cannon and others already denied their rights under § 901 the protection accorded by that section. That is, if § 902 were the exclusive means of enforcing § 901, Ms. Cannon might never be admitted to medical school even if the reason for denial of admission were proven to be gender-based.

The rights created under § 901 are not coextensive with the enforcement mechanism established under § 902 for another reason: Section 901 applies to any educational program or activity receiving federal funds, while § 902 vests enforcement authority only in federal "agencies or departments." While it is true that, for the most part, federal financial assistance to education is dispensed through federal departments and agencies, it is not uniformly so. The Houses of Congress, the Executive Office of the President, and various governmental corporations directly funded by Congress may dispense such assistance as well.

For example, the Legal Services Corporation, created in 42 U.S.C. § 2996 et seq., may not be an "agency" or "department" within the meaning of § 902. See 42 U.S.C. § 2996d(e)(1). Yet, it may, either directly or by grant or contract, undertake educational activities, 42 U.S.C. § 2996e(a)(3)(B). While §901 would apply to programs such as those funded by the Legal Services Corporation, § 902, seemingly, would not. Thus, if § 901 were not privately enforceable, there might be no enforcement at all for such programs.

Section 902 is not only incapable, operating alone, of serving the rights protected by § 901, it serves a function which § 901 standing alone would not. The authority and responsibility of federal departments and agencies to take gender-based discrimination into account in making funding decisions would not inexorably follow from personal protection against discrimination by programs receiving federal funds. Indeed, questions about whether such authority existed with respect to racial discrimination prohibited by the Fourteenth Amendment was the original reason for expressly including that authority in the Civil Rights Act of 1964. 109 Cong. Rec. 11161 (1963) (Message of Pres. Kennedy).

These considerations indicate that §§ 901 and 902 serve entirely different functions. The first guarantees rights to individuals in the same way as do the equal protection clause of the Fourteenth Amendment and the declaratory civil rights statutes. The second lodges in federal departments and agencies the authority, and the responsibility, to refuse federal funds to programs which do not accord the rights guaranteed.

Obviously, Congress viewed the administrative enforcement mechanism as a useful means of helping to establish the rights created by Title IX as a reality on a national basis. But it is odd, indeed, to conclude, as in effect did the Court of Appeals, that by creating an entirely separate and differently focused means in aid of its ultimate goal, Congress negated the assurance of relief to individuals which would otherwise follow from a declaration of individual rights.[18]

2. *Congressional Intent on the Role of § 902.* The availability of individual judicial relief follows, without more, from the structure and language of Title IX as read in the light of the effect ordinarily to be given Congressional guarantees to individuals. There are, however, specific indications that Congress did not understand § 902 to constitute the sole means of enforcing § 901.

A. First, and perhaps most important, there is another section of the Act of which Title IX was a part which is expressly predicated upon the understanding that the language and structure used in Title IX permit judicial

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[18]This is not to say, of course, that Congress may not guarantee personal federal rights and then expressly require that such rights may be vindicated in court only in certain ways and only after certain procedural prerequisites are fulfilled. For example, in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq. Congress guaranteed the right to be free of discrimination in places of public accommodation but required notice to the appropriate local agency, entrusted with local enforcement of an antidiscrimination guarantee, before a private suit could be instituted (42 U.S.C. § 2000a-3(c)); limited such a suit to an action for preventive relief only (42 U.S.C. § 2000a-3(a)); and, expressly made this limited suit, and enforcement by the Attorney General, the exclusive remedies for violations of the rights protected. 42 U.S.C. § 2000a-6(b).

Similarly, in Title VII of the same Act, 42 U.S.C. § 2000e et seq., Congress guaranteed the right to be free of employment discrimination, but required a person whose rights had been violated to file a complaint with the Equal Employment Opportunity Commission, and to wait for this agency to act before instituting a civil suit. 42 U.S.C. § 2000e-5(f)(1). Where such procedural prerequisites are lacking, however, the implication is not that no judicial enforcement is permitted but, rather, that the ordinary rules governing civil actions apply in such an enforcement proceeding. *Johnson v. Railway Express Agency, supra,* 421 U.S., at 460-461.

enforcement by affected individuals. Section 11 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, provides attorneys' fees to successful plaintiffs in suits involving education and brought under, *inter alia,* Title VI of the Civil Rights Act of 1964, the structural model for Title IX.[19] The predicate for providing attorneys' fees to successful individual plaintiffs is, of course, the understanding that a private enforcement action is available. By 1972, Title VI had already been held by several courts to permit such enforcement.[20] and Congress, far

[19]The Emergency School Aid Act, in its final form, passed both houses of Congress, as did Title IX, as part of the Education Amendments of 1972, and appeared as Title VII of the Amendments. See S.Rep. No. 92-604, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News, at 2595.

Section 11 provides:

> "Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin *in violation of title VI* of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis supplied.)

[20]Cases decided *before* 1972 indicating the existence of a private right of action under Title VI include: *Alvarado v. El Paso Indep. School District,* 445 F.2d 1011 (5th Cir. 1971); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967); *Rolfe v. County Board of Education,* 282 F.Supp. 192, 194 (E.D. Tenn. 1966); *Southern Christian Leadership Conference, Inc. v. Connolly,* 331 F.Supp. 940 (E.D. Mich. 1971); *Gautreaux v. Chicago Housing Authority,* 265 F.Supp. 582 (N.D. Ill., 1967).

In *Bossier Parish,* the earliest circuit court case and therefore the best known, Judge Wisdom, joined by Judge Brown and Chief Justice (then Judge) Burger stated:

> "The Negro school children, as beneficiaries of [Title VI], have standing to assert their Section 601 rights." *Id.,* at 852.

from disagreeing with that assessment, determined to *encourage* the filing of such lawsuits by assuring successful plaintiffs payment of attorneys' fees. In particular, there was discussion in Congress of the need for private as well as public enforcement of the civil rights statutes because of "the enormous gaping law enforcement crisis in the field of civil rights." 117 Cong. Rec. 11339 (1971) (remarks of Sen. Mondale).[21]

It is true that, in 1972, Congress did not provide attorneys' fees for plaintiffs in Title IX cases. This step was taken, as to Title IX, after a period of experience under the new Act parallel to that which had occurred under Title VI by 1972.[22] This delay does not,

[21]See also 117 Cong. Rec. 11339-11340 (remarks of Sen. Mondale); *id.,* at 11345; 117 Cong. Rec. 10951-10952 (remarks of Sen. Dominick).

[22]The later Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 *as amended,* not only extended attorneys' fees provisions to Title IX but also to *all* Title VI cases. Statements made during the debate of that bill stressed the importance of private enforcement of Titles VI and IX. *See, e.g.,* 122 Cong. Rec. S16252 (daily ed., Sept. 21, 1976) (remarks of Sen. Kennedy); 122 Cong. Rec. S16262 (remarks of Sen. Allen); 122 Cong. Rec. S16431 (remarks of Sen. Hathaway); 122 Cong. Rec. S17051 (remarks of Sen. Tunney); 122 Cong. Rec. S17052 (remarks of Sen. Abourezk); 122 Cong. Rec. H12165 (daily ed., Oct. 1, 1976) (remarks of Rep. Sieberling); 122 Cong. Rec. H12159 (remarks of Rep. Criban); 122 Cong. Rec. H12164 (remarks of Rep. Holtzman).

It is true that other members of Congress noted, quite correctly, that the *1976* bill "does not authorize . . . any private right of action which does not now exist." 122 Cong. Rec. H12161 (daily ed., Oct. 1, 1976) (remarks of Rep. Railsback). The salient point, however, is that the members of Congress in 1976 shared the view of Congress in 1972—that the language and structure of Title IX *did* create a personal right which could be enforced in court.

however, detract from the significance of § 11. For, that section embodied in positive law the plain understanding that the two part approach of Title IX—creation of personal rights in one section, and provision of an administrative mechanism focused upon the funding process in another—does not destroy the usual availability of private enforcement of personal federal rights.

B. Second, Congress apparently perceived no fundamental inconsistency between private enforcement suits and the means of administrative policing of Title IX provided in § 902. For, Congress failed to foreclose the judiciary from enforcing § 901 rights in lawsuits brought at the behest of individuals and derived from Title IX although not brought directly under it. For example, HEW requires that every application for Federal financial assistance for any education program or activity "shall contain an assurance . . . that [the] program or activity . . . will [not violate § 901]." 45 C.F.R. § 86.4(a). A recent decision of this Court suggests that private individuals could sue for enforcement of such assurances if state law so permits, *Miree v. DeKalb County,* 433 U.S. 255 (1977); *cf. Lau v. Nichols,* 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring). Similarly, if the institution sued were run by a state or local governmental body, a lawsuit for denial of the Federal statutory rights guaranteed by Title IX could almost certainly be premised upon 42 U.S.C. § 1983.[23] See

[23]A case presently pending before this Court, *Chapman v. Houston Welfare Rights Organization,* 555 F.2d 1219 (5th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3526 (1978) (No. 77-719) involves the question whether 42 U.S.C. § 1983 includes, as that Section's literal language would suggest, cases based upon denial of federal statutory rights.

De la Cruz v. Tormey, ... F.2d ..... (9th Cir. Sept. 13, 1978), Slip Op., at 20-23. The fact that Congress failed to eliminate either of these possibilities suggests that no exclusion of the ordinary judicial means of enforcing personal rights was intended.

C. Third, the legislative history of Title VI supports our view of the diverse roles of §§ 901 and 902. As noted previously (Part I (2), *supra*), the debate in Congress on Title IX focused almost entirely upon the character of the guarantee provided. There was little direct discussion of the administrative enforcement procedure; rather, it was stressed that the provisions of Title IX on that matter were "parallel to those found in Title VI of the 1964 Civil Rights Act." 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). Thus, while the considerations supporting the availability of private judicial enforcement are especially compelling as regards Title IX,[24] the legislative history of Title VI is also of some aid in construing the purport of Title IX. That history is inconclusive on the precise question of whether private enforcement was contem-

[24]As noted, Title IX's *principal* focus was the creation of new personal rights while, in Title VI, the constitutional protections were considered adequate, at least as regards public institutions, and the major purpose of the legislation was to involve the federal government in assuring protection of previously existing rights. (*Bakke, supra,* 46 U.S.L.W., at 4900 (Opinion of Powell, J.); *id.,* at 4912-4915 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.).) Further, by 1972, the language and structure of Title VI had been judicially construed to permit private enforcement (see n. 20, *supra*), and this understanding was incorporated in another Title of the Act of which Title IX was part. See pp. 29-32 *supra.*

plated.[25] There are, however, several strong indications in legislative history of § 601 of Title VI that § 601 was intended and understood as an independent declaration of rights, not limited by the provisions of § 602.

The message of President Kennedy which outlined the proposals that became the Civil Rights Act of 1964 clearly envisioned the administrative fund termination mechanism as supplementary to, rather than a replacement of, private enforcement of personal rights:

> "Simple justice requires that public funds to which all taxpayers of all races contribute not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination . . . It should not be *necessary* to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution *also*. . . ." 109 Cong. Rec. 11161 (1963) (emphasis supplied).

This same view was reflected during the debate upon Title VI:

> "If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies fall into two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously, action to end discrimination is preferable . . . But if the discrimination persists . . . , how else can

[25]See legislative history discussed in *Bakke*, 46 U.S.L.W., at 4900, n. 18 (Opinion of Powell, J.); *id.*, at 4926 & n.4 (Opinion of White, J.); *id.*, at 4936 n.28 (Opinion of Stevens, J.). Read in context, the statements cited by Justices Powell and White to the effect that no private enforcement suits were available seem plainly to pertain to suits to terminate funds, rather than to suits to enforce § 601 through equitable relief. See n. 17, *supra* & n. 30, *infra*.

> the principle of nondiscrimination be vindicated except by the nonpayment of funds?" 110 Cong. Rec. 9605 (1964) (remarks of Sen. Ribicoff).

Moreover, it seems that the language and structure of Title VI were carefully chosen to make clear that the Title embodied both a declaration of personal rights and an administrative mechanism, rather than simply the latter. For, the first version of what became Title VI, H.R. 7152, 88th Cong., 2d Sess. (1964), had no declaration of rights parallel to § 601. Rather, it simply provided that Federal financial assistance need not "be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against . . . ." The House Judiciary Committee rejected this language, substituting the two-part approach used in Title VI. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 2391.

The significance of this change was understood by the members of Congress, as a controversy which developed during the enactment of Title VI demonstrates. In the House of Representatives, opponents of Title VI had complained about the fact that its language appeared to encompass federal assistance in the form of contracts of loan or guarantee. H.R. Rep., *supra*, 1964 U.S. Code Cong. & Ad. News, at 2454. The result it was claimed, given the degree to which private mortgages were guaranteed by the federal government, would be to convert Title VI into a fair housing bill. See, e.g., 110 Cong. Rec. 2500-2501 (1964) (remarks of Rep. Ryan, Celler, Jones and

Randall). In response to this fear, § 602 was amended to make clear that no administrative action would be taken on the basis of contracts of loan or guarantee. *Id.*

In the Senate, however, it was objected that amending § 602 was insufficient. Unless § 601 were also amended to the same effect, it was said, "Section 601 could be construed to be an open housing ordinance." 110 Cong. Rec. 13435 (1964) (remarks of Sen. Long); see also, *id.*, at 13436 (remarks of Sen. Long).[26] The premise of this suggestion was that:

> "[S]ection 601 is not limited by section 602 . . . [Although] both sections are in one title . . . they do not conform . . . Not only do I say so; the Senator from Minnesota [Mr. Humphrey] says so. The bill so provides . . . [T]his provision purports to give statutory authority for an order . . . to haul any householder who has a Government-secured loan into Court." 110 Cong. Rec. 13436 (remarks of Sen. Gore).

While it was argued, in response to this proposal, that "[t]he trouble with the sponsors of the . . . amendment is that they are not reading Title VI as a whole" (110 Cong. Rec. 13435 (remarks of Sen. Humphrey)), there was nonetheless, adamant resistance on the part of the sponsors of Title VI, and of the Justice Department, to

[26]The care with which the two-part approach of Title VI and the language thereof were chosen was also stressed by Senator Dirksen: "This language was hammered out slowly and rather carefully in the course of many conferences. I earnestly hope that the amendment . . . will be voted down. 110 Cong.Rec. 13438.

amending § 601 to parallel § 602 in this regard. The reason was:

> "[I]f we were to write any exception into [§ 601], we shall be acting to allow discrimination in some of our programs . . . We have spent much time and have been very meticulous in drafting Title VI . . . ." 110 Cong. Rec. 13442-13443 (remarks of Sen. Pastore).

This view was also succinctly expressed by Senator Keating:

> "All that is necessary is to read section 601. . . . We cannot say that it shall be national policy under the Constitution to discriminate. Section 602 is *entirely different* . . . [T]he Federal agency is limited in what it can do under Section 602." *Id.*, at 13437 (emphasis supplied).

See also *id.*, at 13442 (remarks of Sen. Humphrey); *id.*, at 13469 (remarks of Sen. Long); *id.*, at 13448 (remarks of Sen. Dirksen).

The result was that, rather than amending § 601, Congress added an entirely different section, § 605, 42 U.S.C. § 2000d-4. This amendment was designed to assure that Title VI was not construed to add any theretofore non-existent power of the Executive Branch with regard to fair housing protection, while avoiding any sanctioning of discrimination in federally-assisted housing. 110 Cong. Rec. 13469-70.

The import of this sequence is that, first, the entire dispute was premised on the assertion that § 601 serves

a different function from § 602; second, that despite some statements appearing to dispute this construction, the Senate as a whole apparently concurred in it, for it agreed to an amendment with respect to the precise subject of dispute; and third, that by refusing to amend § 601 itself, Congress indicated an intention to preserve the distinction between the declaration of rights and the conferral of enforcement authority upon the Executive Branch. Since Title IX was modelled upon Title VI, the same distinction applies to Title IX.

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In sum, the language and structure of Title IX, as well as the legislative history of that Title and of Title VI of the Civil Rights Act of 1964, make plain that § 902 was not intended as a limitation upon the personal rights created in § 901, or upon the ordinary availability of private judicial enforcement of personal federal rights. Rather, § 902 provided means of promoting the protections accorded by § 901 additional to those which would exist if § 901 stood alone.

III

The Court of Appeals Misconstrued and Misapplied this Court's Precedents on the Availability of Private Judicial Enforcement.

In reaching its conclusion that the fund termination mechanism in § 902 was the exclusive means of enforcing § 901, the court below entirely ignored the personal character of the rights created in § 901, and the lack of

congruence between those rights and the differently-focused procedures contained in § 902.[27] Instead, the Court of Appeals relied upon a series of recent cases concerning regulation of industry in which the statutory remedy was held to be exclusive. These cases—*National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers ("Amtrak")*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour* ("SIPC"), 421 U.S. 412 (1975); and *Cort v. Ash*, 422 U.S. 66 (1975)—involved statutes which bear little resemblance to Title IX in their language, structure, or purpose. Moreover, properly understood, the analysis applied in the most fully explicated of these cases, *Cort, supra*, yields the same result we reach under the somewhat different approach employed above. Finally, the Court of Appeals entirely missed the significance of three other cases—*Allen v. Board of Elections*, 393 U.S. 544 (1969), *Calhoon v. Harvey*, 379 U.S. 134 (1964), and *Rosado v. Wyman*, 397 U.S. 1207 (1969)—which, taken together, squarely control the disposition of this case.

1. *Amtrak, SIPC, and Cort.* Title IX expressly guarantees rights to individuals. See Part I, *supra*. In contrast the statutory provisions which this Court interpreted in the three cases upon which the Court of Appeals principally relied involved the regulation of industry. In *Amtrak, supra*, the provision sued under provided that

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[27] Indeed, the court characterized the plaintiffs in Title IX enforcement cases as "private attorneys general" (559 F.2d, at 1031), implying, erroneously, that Ms. Cannon and others in her position are attempting to enforce public rather than personal interests.

except under specified circumstances, "no railroad may discontinue any intercity passenger train . . ." 45 U.S.C. § 564. In *Cort,* the statute declared that: "It is unlawful for any national bank or any corporation . . . to make a contribution or expenditure in connection with any election . . ." 18 U.S.C. § 610. And in *SIPC,* the section at issue stated that if a brokerage firm shows particular indices of financial responsibility, ". . . SIPC . . . may apply to any court . . . for a decree adjudicating that customers of such members are in need of the protection provided by [the Act] . . . ." 15 U.S.C. § 78eee(d)(2)

As their language suggests, the statutes construed in *Amtrak, SIPC* and *Cort* were Congressional responses to macro-economic problems. The focus was on regulation of industry, on forces and groups rather than individuals.

The Amtrak Act, for example, was a response to the disastrous economic condition of the railroads. While Congress was concerned with railroad passengers, it recognized that "a rational reduction of present service will be required in order to save *any* passenger service." H.R. Rep. No. 91-1580 p. 3 (1970), reprinted in 1970 U.S. Code Cong. and Admin. News, at 4747, cited in *Amtrak,* 414 U.S., at 463 (emphasis in original). Thus, although the interests of the railroad-riding public in general were to be benefited by the massive federal involvement in the industry, no *individual* passenger's interests in having service on any particular route were guaranteed.

Similarly, the act creating SIPC ("SIPA") was a response to an economic crisis. The securities industry experienced a serious business contraction that led to the failure or instability of many brokerage firms. *SIPC,* 421 U.S., at 415. Congress created a non-profit, private membership corporation with powers to institute a new form of liquidation proceeding. While a primary purpose of Congress in enacting SIPA was the protection of investors, there was no guarantee that SIPC would intervene to save any *individual's* investment. In fact, the Court stressed that whether a firm was to be liquidated in accord with the special provisions of SIPA involved considerations of "public interest", and not solely the rights of individuals: "As with Amtrak, so with SIPC, Congress has created a corporate entity to solve a public problem." *Id.,* at 420.

Finally, in *Cort,* the statute involved was a penal statute designed principally to serve a public interest—assuring that "federal elections are free from the power of money." 442 U.S., at 82. The protection of corporate shareholders was at best a subsidiary purpose. 422 U.S., at 81.

Thus, in all three of these cases, there was Congressional concern with the interests of particular *groups*—the investing public in *Cort* and *SIPC,* and railroad-riding public in *Amtrak*— but the statutes were a response to an economic or political crisis; the substantive provisions as well as the means of implementing those provisions were based upon quite different considerations than protection of the rights of individuals.[28] For this reason, these cases did not

[28]Most of the other cases in which this Court has discussed the problem of implication of a private right of action have similarly

involve situations in which general principles concerning judicial enforcement of personal rights raised a presumption in favor of private lawsuits. The Court of Appeals therefore erred in viewing these cases as dispositive of the present one.

2. *The Cort Analysis.* Not only are the results in *Amtrak, SIPC,* and *Cort* not determinative of the present controversy, but the mode of analysis employed in these cases, explicated at some length in one of the cases, *Cort,* supports if properly applied the availability of private enforcement of § 901 of Title IX. In *Cort,* the Court set out several factors relevant to determining the availability of private actions enforcing federal statutes:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was created.' • • •—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? • • • Third, is it consistent with the underlying purposes of the legislative scheme

concerned statutes which do not expressly guarantee rights to individuals. Many of the cases have involved interpretation of criminal provisions, included as part of complex economic regulatory statutes. (*Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975) (Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5); *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462 (1977) (Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5); *Piper v. Chris Craft,* 430 U.S. 1 (1977) (15 U.S.C. § 78n (a)). *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964) (15 U.S.C. § 78n (a)); *Texas & P.C. Co. v. Rigsby,* 241 U.S. 33 (1915) (45 U.S.C. § 11). Others have involved interpretation of provisions specifying the powers and duties of governmental and quasi-governmental entities: *Wheeldin v. Wheeler,* 373 U.S. 647 (1963) (Subpoenas; Legislative Reorganization Act of 1947, House Rule XI(1)(q)(2)); *T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959) (reasonable rates for motor carriers; 49 U.S.C. § 316 (b) & (d).

> to imply such a remedy for the plaintiff? • • • And finally, is the cause of action one traditionally relegated to state law, in any area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S., at 78.

All four of these factors, properly understood, argue strongly in favor of private judicial enforcement of § 901.

The answer to the first question, whether "the plaintiff one of the class for whose *especial* benefit the statute was enacted," is not only plainly affirmative in this case, but is the strongest reason for the availability of a private judicial remedy. For in Title IX, as we have shown above, the essential purpose of the statute was to guarantee individual rights to equal educational opportunities. Thus, not only are alleged discriminatees as a *class* protected by Title IX, their *individual* protection is central to the statutory scheme.

The second factor considered in *Cort* was: "is there any indication of Congressional intent to create or deny a remedy for members of the class to which the plaintiffs belong?" Application of this factor poses little difficulty in this case. For, *Cort* explicitly recognized that ". . . in situations in which it is clear that federal law has granted a class of persons certain rights, it is *not necessary to show an intention to create* a private cause of action although an explicit purpose to deny such cause of action would be controlling." *Cort, supra,* 422 U.S., at 82 (emphasis supplied). There was no explicit intent to deny a private cause of action under Title IX.

The Court of Appeals, however, nonetheless stressed "the lack of any explicit or implicit intent to *create* a private judicial remedy . . ." (559 F.2d at 1087 (emphasis supplied)) and viewed the "express provision of a sophisticated scheme of administrative enforcement . . . as an indication of an *implicit* legislative intent to exclude any private judicial remedies . . ." *Id.* In essence, then the court below approached this case as one involving the usual methods of statutory construction. While, in this case, consideration of the legislative materials does indicate an intent to permit private enforcement (Part 11(2), *supra),* as Justice Harlan noted in *Bivens, supra:*

> "The exercise of judicial power involved in the private cause of action cases simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120-1121 (1969); nor did the *Borak* Court purport to do so. See *Borak,* 377 U.S. at 432-434. The notion of 'implying' a remedy, therefore, . . . can only refer to a process whereby *the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law.* See *ibid.,* and *Bell v. Hood, supra,* 327 U.S., at 684." 401 U.S., at 402 n.4 (emphasis supplied).

Thus, as *Cort* recognized, the issue in private cause of action cases is not, ordinarily, whether Congress *intended* such actions but, rather, whether it expressly negated the power of the judiciary to provide traditional remedies.

Moreover, it is obvious that legislative creation of an enforcement mechanism may not, without more, be construed as an "implicit" intent to forbid private actions; indeed, *Cort* expressly so stated. 422 U.S., at 82 n.14. For, while Congress does occasionally pass a statute providing no enforcement mechanism at all (see, e.g., 42 U.S.C. §§ 1981 and 1982), such statutes are exceedingly rare; in most of the cases in which private remedies *have* been "implied," those were one or more remedies included in the statute, but such remedies were held not to be exclusive. See, e.g., *Borak, supra; Rigsby, supra; Allen v. Board of Elections,* 393 U.S. 544 (1969); *Rosado v. Wyman,* 397 U.S. 397 (1970). Thus, the approach of the Court of Appeals to the second *Cort* factor was premised upon a basic misunderstanding of the role of the courts in cases involving the availability of private remedies.

As to the third *Cort* factor,—whether the remedy sought is consistent with the underlying purpose of the statutory scheme—it is difficult to see how personal remedies would be inconsistent with that scheme, where the purpose of the statute is to guarantee individuals the right to equal opportunities. For example, in *Allen , supra,* the Court, noted that the Voting Rights Act there construed included a "guarantee . . . that no person shall be denied the right to vote for failure to comply with an unapproved new enactment" *Id.,* at 557. While the Attorney General has the power to enforce this guarantee,

> "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations . . . The guarantee . . . might well prove an empty promise

unless the private citizen were allowed to seek judicial enforcement of the prohibition. *Id.*, at 557."[29]

The Court of Appeals questions the appropriateness of implying a private remedy for violation of § 901 rights in light of the Congressional emphasis in § 902 of the role of voluntary compliance in the administrative procedures for fund termination. However, a private enforcement action not only furthers the Congressional purposes of securing personal rights, but does not interfere with the administrative fund termination mechanism.[30]

[29]The actual experience under Title IX demonstrates that, certainly to the present time, HEW has not been able effectively to implement the enforcement power it has under § 902. Until July, 1975, the implementing regulations for Title IX were not even promulgated. Thereafter, HEW refused, on the basis of insufficient resources, to handle Title IX complaints regarding elementary and secondary schools in seventeen southern and border states and, as of October 1, 1976, regarding institutes of higher education as well. Because of this sorry enforcement effort, some of the present *amici*, along with other groups and individuals, filed suit against HEW to compel the beginning of enforcement efforts. *Women's Equity Action League ("WEAL") v. Mathews,* Civ. Action No. 74-1720 (D.D.C.). The settlement recently reached in that lawsuit would, if effectively implemented, make HEW, for the first time, a significant force in the enforcement of Title IX. See *WEAL, supra,* (Order of December 29, 1977). However, the history of the related litigation concerning Title VI, *Adams v. Califano,* Civ. Action No. 70-3095 (D.D.C.) illustrates that a succession of court orders in that case has yet to result in effective enforcement of Title VI. Preliminary evidence indicates that HEW has been similarly unable to comply with the December 29, 1977 *WEAL* Order. Further that Order, of course, does not eliminate the inherent problems with § 902 as a means of enforcing individual rights. See Part II(1), *supra.*

[30]The case might be otherwise as regards a private action seeking termination of funds. *Bakke, supra* 46 U.S.L.W., at 4936 n.25 (Opinion of Stevens, J.).

In fact, the emphasis on voluntary compliance is *served* by private lawsuits. For, that emphasis resulted from Congressional concern with the drastic nature of fund termination. Vindication of personal rights through private lawsuits may help to avoid for fund termination.

The fourth *Cort* criterion—whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the states"—is also met in this case, in a manner which not only permits but strongly supports private enforcement. Federally created personal rights are not a subject traditionally relegated to state law. *Bivens, supra.* In the case of Title IX, the basic federal concern is obvious: federal funds are financing the educational programs involved, and gender-based discrimination in educational institutions was perceived as a nationwide problem requiring a nationwide solution. See Part I(2), *supra.* To relegate individuals to widely-variant state laws to vindicate their personal rights to be free of sex discrimination in institutions receiving federal funds would be an odd way indeed to implement a federal guarantee to *all* persons in the United States.

Thus, applying the *Cort* analysis properly yields the result that the individual rights created in Title IX can be enforced by private lawsuits. The Court of Appeals erred in determining otherwise.

3. *The dispositive cases.* Our view of *Cort* is supported by three pre-*Cort* cases which the Court of Appeals either did not mention at all—*Calhoon v. Harvey,* 379 U.S. 134 (1964)—or mentioned only in passing—*Allen, supra* and

Rosado v. Wyman, supra. Indeed, these three cases, which are consistent in their analysis with *Cort* and which *Cort* did not purport to disturb, are, taken together, controlling of this case.

In *Allen, supra* and *Calhoon, supra,* this Court considered provisions analogous to Title IX in that they were directed at the individual rights.[31] In both cases, the primary inquiry was, as *Cort* later recognized, whether there was express Congressional intent to *deny* the plaintiff the traditionally available judicial remedies.

In *Calhoon,* there *was* an express provision in the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 3401 *et seq.*, making the statutory remedy exclusive for violation of Title IV's election procedures. 379 U.S., at 137. The traditional judicial remedies were *expressly* foreclosed, and only the Secretary of Labor was authorized to bring suit to protect the rights of individual union members.

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[31]In *Calhoon,* the relevant provision stated:

"... *every member in good standing shall be eligible to be a candidate and to hold office* (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and *shall have the right to vote for* or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof." 29 U.S.C. § 481(e) (emphasis supplied).

In *Allen,* the relevant provision stated:

"... and unless and until the court enters such judgment *no person shall be denied the right to vote* for failure to comply with such qualification, prerequisite, standard, practice, or procedure ..." 42 U.S.C. § 1973c (emphasis supplied).

In *Allen,* this Court was, as noted, concerned with the Voting Rights Act—explicitly, with the provision requiring political entities to submit alterations of voting qualifications or procedures to a district court or to the Attorney General. 42 U.S.C. § 1973c. Like Title IX, the provision is expressly directed at the protection of individuals: "No *person*" could be denied the right to vote for failure to comply with a qualification or procedure unless it had been submitted for review as required by the statute.[32] As in Title IX, there is an enforcement mechanism provided in the Voting Rights Act: The Attorney General, upon a complaint, could seek to enjoin the alteration. *Allen,* 393 U.S., at 558 n.21.

After noting that the purpose of the act was to guarantee individuals the right to vote, the Court in *Allen* explored only one question in determining whether private individuals should be allowed to sue to enforce their rights to vote: Is enforcement by the Attorney General sufficient to protect each citizen's right to vote? Given the number of individuals and of political entities, the Court had little trouble in concluding that individuals must be allowed to sue.

Thus, *Calhoon* and *Allen* demonstrate that, as *Cort* later suggested, if a statute expressly creates personal

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[32]Indeed, in *Allen,* the statutory language and structure are not as closely limited to individuals as in this case. For, while the general purpose of the Voting Rights Act was to protect the right of individuals to be free of racial discrimination in voting, the statutory provision under which the plaintiffs sued was principally a directive to specified political subdivisions to submit proposed enactments affecting voting to a federal court or to the Attorney General of the United States.

rights, private enforcement is available *unless* Congress specifically provides otherwise *or* the statutory enforcement mechanism was plainly designed for and capable of protecting the individual rights guaranteed.

Rosado, supra, establishes the necessary corollary—that provision of a fund termination mechanism as the means of enforcing federal standards for grants is *not* to be construed as either an intention to foreclose private suits or an indication that such suits are fundamentally incompatible with the statutory enforcement scheme.

In *Rosado,* plaintiff welfare recipients sued to enforce a directive in a federal statute to states participating in the Aid to Families with Dependent Children program.[33] The Court concluded they may seek relief. The only question explored was whether the presence of the fund termination mechanism was the exclusive remedy available. In concluding it was not, the Court emphasized the role of federal courts where federal funds are involved:

> "It is peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Rosado,* 397 U.S., at 423.

The Court therefore concluded that the existence of fund termination authority does not foreclose private suits.

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[33] "[The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and . . . . any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." 42 U.S.C. § 602(a)(23).

Thus, *Allen, Calhoon,* and *Rosado* together establish that where clearly articulated federal rights are guaranteed to individuals, and fund termination is not an expressly exclusive remedy, it is the duty of federal courts to afford those individuals the traditionally available judicial remedies. These cases inescapably point to the conclusion that individuals should be allowed to sue to protect their federal right to equal educational opportunities despite the existence of a fund termination procedure.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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